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Supreme Court of the United States

October Term, 1963

No. 1067

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO; CENTRAL STATES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO; and KENTUCKIANA JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Petitioners,

and

NATIONAL LABOR RELATIONS BOARD,

vs.

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 12, 1963.

Opinions Below

The Decision and Order of the National Labor Relations Board (J.A. 189-195)[1] including the Intermediate Report

[1] The record in the Court was printed in the Joint Appendix cited herein as "J.A.", nine copies of which have been filed with this petition.

of the Trial Examiner (J.A. 171-184) is reported at 139 NLRB 1321 (1962). The order of the National Labor Relations Board modifying its original decision and denying Petition for Reconsideration (J.A. 204-206) is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit as originally issued is reproduced in Appendix A of this petition. On Petitions for rehearing and rehearing *en banc*, the Court issued an order denying same. This order appears in Appendix B of this Petition. The opinion of the Court together with the denial of rehearing are reported at 326 F. 2d 663 (1963).

Jurisdiction

The judgment of the Court of Appeals was entered on December 12, 1963. A timely Petition for Rehearing and Rehearing *en banc* was denied on February 12, 1964. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U. S. C. Section 1254(1). Petitioners as Respondents before the National Labor Relations Board, and as Intervenors before the Court of Appeals have standing to apply for the instant petition. *City of Chicago* v. *Atchison, Topeka and Santa Fe Railroad Co.*, 357 U. S. 77 (1958).

Questions Presented

1. Whether an agreement between a union agent and a company agent to hire union organizers as regular employees violates Section 8(b)(1)(A) of the National Labor Relations Act, where no organizers were hired pursuant to such agreement, and where there has been no finding that the union was otherwise aided or assisted in violation of Section 8(a)(2) of the National Labor Relations Act.

2. Whether the Court of Appeals on review of a Decision and Order of the National Labor Relations Board

may rule on an alleged violation of the National Labor Relations Act not alleged in the complaint issued by the Board and not raised by any of the parties in any prior proceeding or before the Court itself.

3. Whether the Court of Appeals on review of a Decision and Order of the National Labor Relations Board may remand a case to the Board for the taking of evidence on a point involving a novel theory of law not raised by any of the parties in any prior proceeding or before the Court itself, where such a remand was not requested by any of the parties and where there is no showing that the evidence sought was not available at the hearing before the Trial Examiner.

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

> "Section 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).
>
> "Section 8(b)(1)(a). It shall be *an* unfair labor practice for a labor organization or its agents * * * to restrain or coerce * * * employees in the exercise of rights guaranteed in section 7 * * *.
>
> "Section 10(e). * * * No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be

excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record * * *.

"Section 10(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside * * *. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Statement of the Case

The complaint issued by the National Labor Relations Board in this matter alleged that a company operating a retail discount store had unlawfully assisted Petitioners

(Respondent unions herein referred to as the "Amalgamated") by,

> "* * * knowingly and wilfully and pursuant to arrangement and agreement with Respondent Unions' hiring and employing agents and organizers of Respondent Unions for the purpose of permitting such agents and through them Respondent Unions to organize * * * its employees * * * while denying similar privileges to RCIA * * *." (J.A. 148)

The National Labor Relations Board found as a fact that the record did not support a finding that organizers "were hired pursuant to * * * 'arrangement'" (J.A. 205). The Board found as a fact that the company did not assist the Amalgamated in its organizing activities (J.A. 192). The Board also found as a fact that the company did not treat the charging unions (herein referred to as "RCIA") disparately (J.A. 193).

The Board found that Amalgamated organizers were hired by a company official who knew nothing of any alleged agreement (J.A. 205) and concluded that the record did not show that the Amalgamated organizers were hired "for any reason other than the fact that they were needed to do the work required at the Company's Muncie store" (J.A. 205).

Without questioning these findings of fact, the Court of Appeals ruled that a violation of Section 8(b)(1)(A) of the Act would be established by the existence of such an agreement to hire organizers, by the fact that organizers were hired, and by the fact that the company was organized and did sign a contract. This theory of the case had not been raised by any party at any stage of the proceeding. Nevertheless, on the basis of this theory, the Court of Appeals remanded the case to the Board for additional evidence as to whether such an agreement to hire organizers was made, although no party had requested such a remand, and despite the fact that all witnesses referred to by the

Court in said remand had been available to testify at the time of the hearing before the Trial Examiner.

A. The Facts.

The facts of this case are straight-forward. Three Amalgamated organizers were hired as regular employees by the company in the normal course of its operations. With respect to one organizer, Norma Howard, the Board's principal witness, Breihof, the Company District Manager, stated in an affidavit that she had been hired "accidentally." (J.A.135) Furthermore, he stated that he did not know that Norma Howard had applied for employment or, in fact, that she had been hired until he later looked through the employee cards (J.A. 135). Moreover, he testified that he did not hire Norma Howard (J.A. 56) and that he had not directed the store manager to hire her (J.A. 56).

With respect to the two other Amalgamated organizers, Ice and Denham, the record is clear that they were hired by Lester LaVictor, the Company's Store Manager (J.A. 58, 79-81, 135). In an affidavit submitted to the National Labor Relations Board, Breihof, who allegedly made the agreement to hire union organizers, stated that LaVictor knew nothing of any agreement and that the organizers were hired "without any word" from himself (J.A. 135).

This statement of the facts surrounding the hiring of the Amalgamated organizers was adopted by the National Labor Relations Board (J.A. 191, 205), and was not questioned by the Court of Appeals.

The record is clear also that the Amalgamated was in no way assisted in organizing the employees of the store. Breihof, who was in charge of the store during the period in question, testified that he knew of no soliciting on company time (J.A. 57) and stated in his affidavit to the National Labor Relations Board that he personally had cautioned the store supervisors to remain neutral (J.A. 136).

He further testified that Norma Howard performed her regular job satisfactorily, that he did not see her sign up employees during working time, that he had no knowledge of any supervisors telling her that she solicited during working hours, that he did not see Ice or Denham soliciting during work hours, and that no supervisors reported to him that they had seen them so soliciting (J.A. 56-57). On the other hand, there was uncontroverted testimony that a substantial amount of organizing activity took place outside the store in the evenings at union dinners (J.A. 34, 72, 82) and at the home of employees (J.A. 68). In addition, Breihof testified that although all supervisors were instructed to report union activities to him (J.A. 35-36) none of them reported any union activity (J.A. 57; see also his affidavit, J.A. 136). The Amalgamated organizers testified that they solicited for union membership only at union dinners, at lunch, on the way to work, and at break periods and after punching out (J.A. 81-82, 84, 90, 91-92).

This statement of the facts with respect to assistance was adopted by the National Labor Relations Board (J.A. 192) and was not questioned by the Court of Appeals.

With respect to the interest of RCIA in organizing employees of the store, the finding of the Trial Examiner (J.A. 178), affirmed by the Board (J.A. 193) and not questioned by the Court of Appeals was; in the words of the Board, "that the Retail Clerks in effect sought to obtain recognition in the Muncie store on the purported basis, that its Fort Wayne contract with the company covers the Muncie operation (J.A. 193). The Board thus found there was no disparate treatment. The Court of Appeals also did not question this finding.

B. The Decision of the Board.

As stated above, the Board found that the organizers were not hired pursuant to any arrangement with the company (J.A. 191, 205). With respect to the alleged

arrangements the Board, relying upon *B. M. Reeves Co. Inc.*, 128 NLRB 320 (1960), said:

> "Nor would such arrangement * * * standing alone, be unlawful. At most, it would indicate an intent to violate the Act. However, the Board has held that mere intent to engage in unlawful conduct, in a context like that presented here is not an unfair labor practice." (J.A. 205-206)

The Board found further that the company did not assist the Amalgamated in organizing activities (J.A. 192), and that RCIA was not treated disparately (J.A. 193).

Finally, with respect to the collective bargaining agreement entered into between the company and the Amalgamated the Board found as follows:

> "* * * the record shows that on August 15, a neutral party conducted an independent card check and certified that Amalgamated represented a majority of the Muncie employees. Relying on this card check, the company, on August 15, recognized Amalgamated as the exclusive bargaining agent for its Muncie employees, and, on August 16, the Company and Amalgamated entered into a collective bargaining agreement containing an agency-shop provision. Under these circumstances, we find that Respondents did not violate the Act by entering into such a collective bargaining agreement on August 16" (J.A. 194).

Board Member Leedom dissented from the Board's ruling solely on the ground that the agency shop provision of the agreement was illegal in Indiana, a "Right-to-Work" state (J.A. 194-195). This holding has been laid to rest by this Court in *NLRB* v. *General Motors Corporation*, 373 U. S. 734 (1963).

C. The Decision of the Court of Appeals.

On review, the Court of Appeals for the District of Columbia reversed and remanded. In so doing, the Court said:

> "We think that if the conspiracy between the management and Amalgamated to organize the Muncie store existed, further proof of its effectiveness is not required to establish violation of Section 8(a)(1), (2) and (3) and Section 8(b)(1)(A). Such a conspiracy would inevitably, to some degree at least 'interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7' and 'interfere with the formation and administration of any labor organization' 29 U. S. C. Section 158(a)(1)(2). See also 29 U. S. C. Section 158(a)(3)."

The Court remanded the case to the Board solely for the purpose of determining "whether or not a conspiracy to violate the Section of the Act in suit did in fact exist."

In its mandate the Court added,

> "If the Board finds that such a conspiracy did exist it will provide appropriate remedies."

Reasons for Granting Writ

The decision below on the conspiracy issue creates a new and unusual interpretation of the National Labor Relations Act. On this issue the decision conflicts with the long-held position of the National Labor Relations Board. See *B. M. Reeves Co. Inc. supra*, 321 and *North Eastern Engineering Inc.* 112 NLRB 743, 744 (1955).

This aspect of the decision also conflicts in significant respects with the decision of the Courts of Appeals in *Local 1325, Retail Clerks International Association, AFL-CIO* v. *National Labor Relations Board*, 325 F. 2d 293 (1st Cir. 1963); in *Local 655 Retail Store Employees Union* v. *National Labor Relations Board*, 321 F. 2d 626 (8th Cir.

1963; and in *Kimbrell* v. *National Labor Relations Board*, 290 F. 2d 799 (4th Cir. 1961). It also conflicts with the posture of this Court taken in *National Labor Relations Board* v. *Local 357 International Brotherhood of Teamsters, et al*, 365 U. S. 667 (1961). Finally, this aspect of the decision conflicts with the legislative history, scant though it may be, surrounding Section 8(b)(1) of the Act. See NLRB, 1 *Legislative History of the Labor Management Relations Act*, 1947 (1948).

In addition to the substantive aspect of the case the Court of Appeals erred on two significant procedural questions. First, the decision of the Court in positing its remand on a violation not alleged in the complaint and not raised by any of the parties at any stage of the proceedings is in direct conflict with the decision of this Court in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U. S. 318 (1961). Second, the Court's remand for the taking of additional evidence is also in direct conflict with this Court's decision in *Ochoa* and raises serious constitutional problems under the double jeopardy doctrine.

1. The Conspiracy Doctrine.

The remand of the Court of Appeals is based on Section 8(b)(1) of the Act. That section provides that,

> "It shall be an unfair labor practice for a labor organization or its agents * * * to restrain or coerce * * * employees in the exercise of rights guaranteed in Section 7 * * *."

These words were carefully chosen by Congress. In a preliminary draft of this section "interference" with employee rights as well as restraint and coercion with respect to these rights was prohibited. But ultimately "interference" was dropped. The managers of the Bill in the House explained this omission in the House Conference Report No. 510, 1 *Legislative History of the Labor Man-*

agement Relations Act, 1947, 534, 547, in the following language:

> "In applying Section 8(1) of the existing law, the Board has not held to be unfair labor practices acts which constituted 'interference' that did not also constitute restraint or coercion. Section 8(1) of the present law is written in broad terms, and only by long continued administrative practice has its scope been adequately and properly defined. Concern has heretofore been expressed as to whether such practice would carry over into a corresponding provision of the new Section 8(b)(1), and presumably because of this concern the words 'interference with' were omitted from the proposed new section."

Thus it seems clear under the language of Section 8(b)(1), relied upon by the Court of Appeals for its reversal, that a union may be held culpable under this section only where it has committed acts of restraint or coercion. Yet, the findings of the National Labor Relations Board which remain undisturbed by the Court of Appeals clearly absolve the Amalgamated of any possible implication in acts of restraint or coercion. The Board found and the Court does not question that there was no assistance in fact given to the Amalgamated in organizing employees of the employer. The Board found and the Court of Appeals does not question that no other union was prevented from organizing the employees of the employer in a legitimate fashion.

The Court of Appeals suggests that whether or not the Amalgamated was assisted by the company, the Amalgamated's success in organizing its employees in a legitimate fashion would be held illegal if it could be proved that a union agent arranged to have organizers hired even though no organizers were hired pursuant to the arrangement. Yet, there is no question but that union organizers may secure employment in a company in order to facilitate

organizing activities. No party, not the RCIA, not the National Labor Relations Board nor even the Court of Appeals questioned the legitimacy of this time honored tactic of union organizing. Thus, the Court of Appeals rationale boils down to the creation of the unfair labor practice of conspiracy, *per se;* a doctrine alien to the purport of the National Labor Relations Act and alien to the gloss which the Board has placed on the Act in its administrative role.

In *B. M. Reeves, Co. Inc., supra,* the Board held, under circumstances similar to those here, that intent to commit an unfair labor practice does not convert conduct "otherwise lawful, into an unfair labor practice". 128 NLRB at 321. This statement of the law is squarely applicable here. For whatever the original intent had been, the Board found as a fact that organizers were not hired pursuant to arrangement and that the Amalgamated received no assistance from the company. These findings of fact were not questioned by the Court of Appeals. Hence, the Court of Appeals has attempted to convert lawful conduct, *i.e.* the employment of union organizers as employees by a company in the normal course of the operation of an employer's business and the use of other legitimate organizing techniques, into an unfair labor practice simply because of an unexecuted, uneffectuated, and to this date unproven, illegal intent to violate the Act.

This importation of common law notions into the National Labor Relations Act has never found favor with the National Labor Relations Board or indeed with this Court. In *North Eastern Engineering Inc., supra,* 744, the Board said:

> "It is well established that the test of interference, restraint or coercion does not turn on the Respondent's motive, but rather on whether the Respondent engaged in conduct which tended to interfere with the free exercise of employee rights under Section 7 of the Act."

This view of the law was adopted by this Court in *International Ladies Garment Workers Union* v. *National Labor Relations Board*, 366 U. S. 731, 739 (1961).

This Court's decision in *Local 357, International Brotherhod of Teamsters* v. *National Labor Relations Board, supra*, is also impressive evidence that the creation of a rule pretermitting conduct which may be illegal in form but not in fact is not favored under the Act. There the NLRB's *per se* standards for judging the legitimacy of union hiring halls were struck down. This Court required instead an actual showing of discrimination.

Finally the decision of the Court of Appeals conflicts to a significant degree with the decisions of the First, Fourth and Eighth Circuits in *Local 1325 Retail Clerks International Association, AFL-CIO* v. *National Labor Relations Board, supra; Local 655 Retail Store Employees Union* v. *National Labor Relations Board, supra;* and *Kimbrell* v. *National Labor Relations Board, supra.*

In each of these cases, as a study of the decisions of the National Labor Relations Board together with the opinions of the Courts will reveal, the employer had agreed with the union in question to permit certain organizing privileges on the premises of the employer. Yet, in each case the Court of Appeals found that despite this arrangement the assistance granted was not sufficient to constitute an unfair labor practice.

These cases apply *a fortiori* here. For here the undisturbed finding of the Board was that even though an arrangement to provide assistance might have been made, no assistance at all was given in fact. Moreover, even if *de minimis* assistance were rendered, and the Board did not find even this quantum of assistance since the Board's undisturbed finding was that the organizers were hired just like other ordinary employees, such *de minimis* assistance would be proper. As this Court said in *National*

Labor Relations Board v. *Babcock and Wilcox Co.*, 351 U. S. 105, 113 (1956):

> "No restriction may be placed on employee's rights to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline . . . ."

See to the same effect *National Labor Relations Board* v. *Cranston Print Works Co.*, 258 F. 2d 206, (4th Cir. 1958).

Finally, the decision of the Second Circuit in *National Labor Relations Board* v. *Revere Metal Art Co.*, 280 F. 2d 96 (2nd Cir. 1960), *cert. den.* 364 U. S. 894 (1960), must be considered in connection with this point. In that case the Second Circuit held that the execution of a contract that might have resulted in a violation of Section 8 (a)(3) of the Act, and therefore presumably of Section 8 (b)(2) as well, was not in itself a violation. Illegal discrimination in fact had to be shown. In that case, employment had been contingent on membership in good standing in the union and such membership was contingent on factors other than the payment of initiation fees and dues. The theory of the Second Circuit is in accord with the view of this Court in the *Local 357* case, cited above. Both decisions plainly conflict with the resolution of the Court of Appeals in the case at bar. For even though no employee was restrained or coerced, even though no employee was discriminated against, and even though no attempt was made to discriminate against any employee because of his membership or nonmembership in the Amalgamated, the Court of Appeals finds in an alleged agreement under which such restraint, coercion or attempted discrimination might, but did not take place, the basis of an unfair labor practice.

2. The Unlitigated Theory of the Case.

The Complaint in this matter does not allege any violation with respect to the claimed conspiracy to hire organizers distinct from the effectuation of that conspiracy.

Nor did any party ever raise such an issue before the National Labor Relations Board or before the Court of Appeals. *Cf. General Tire & Rubber Co.*, 135 NLRB 269 (1958); *Sidney Harvey Westchester Corp.*, 142 NLRB No. 149 (1963). With respect to the alleged conspiracy the complaint states the following:

> "7. Since on or about August 1, 1961, and continuing to date, Respondent Employers have rendered, and are rendering, unlawful aid, assistance and support to Respondent Unions, by the following acts and conduct:
>
> "(a) By their following named supervisors and agents * * * knowingly and willfully and pursuant to arrangement and agreement with Respondent Unions hiring and employing agents and organizers of Respondent Unions for the purpose of permitting such agents and through them Respondent Unions to organize and obtain members and adherents among and designations from its employees * * * while denying similar privileges to RCIA * * * 'Charles Breihof * * * Irving Bernstein * * * Lester W. LaVictor * * *'." (J.A. 148)

Accordingly, an "arrangement and agreement" is alleged to be a violation of the Act only insofar as anyone was hired "knowingly and willfully and pursuant" to it.

Hence, the arguments of all parties throughout this proceeding were directed simply at whether and in what fashion the alleged agreement had been effectuated. Nowhere did RCIA raise the issue that a violation could be made out if the alleged agreement were not in some manner effective or effectuated to achieve the alleged illegal hiring.[2] With respect to this issue 29 U. S. C. 160(e), made

[2] RCIA stated in its Petition for Reconsideration before the Board that "the agreement was tantamount to recognition of ACWA before any solicitation of employees began" (J.A. 201). But this theory was not part of the complaint, was not pressed by RCIA on the Appeal, was not adopted by the Court and is not supported by the Record.

applicable here by the provisions of 29 U. S. C. 160(f), provides:

> "No objection that has not been urged before the Board, its members, agents, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

This Court in *National Labor Relations Board* v. *Ochoa Fertilizer Corp., supra,* only recently explained the relevance of this Section where a court *sua sponte* sought to modify an order of the Board where no party had urged such modification when it said, at p. 322:

> "The authority of the Court of Appeals to modify Board orders when the Board petitions for their enforcement derives from the provision of § 10(e) authorizing the court to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. However, the immediately following sentence of § 10(e) provides that no objection that has not been urged before the Board, its members, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. At least when the Board has not patently traveled outside the orbit of its authority, *National Labor Relations Board v. Cheney California Lumber Co.*, 327 U. S. 385, 388, our cases have uniformly held that in the absence of a showing within the statutory exception of extraordinary circumstances the failure or neglect of the respondent to urge an objection in the Board's proceedings forecloses judicial consideration of the objection in enforcement proceedings."

The decision of the Court of Appeals for the District of Columbia is therefore plainly in conflict with this Court's holding in *Ochoa.*

3. The Remand for Taking Additional Testimony.

No one, not the General Counsel, not the National Labor Relations Board itself, not RCIA and not Petitioners ever urged at any point in this proceeding that the hearing should be reopened for the purpose of taking additional testimony. RCIA themselves referred to the "full hearing" held in this matter in their Petition for Review (J.A. 4); and in their Answer to the Petitioner's Request for Rehearing agreed with Petitioners that the hearing should not be reopened when they stated:

> "If Intervenors do not want the record reopened, it should not be, since the parties are in agreement that the Board may adequately decide the factual question of whether there was a conspiracy on the present record." (p. 3)

Moreover, even if any party had urged such a procedure it would not be appropriate here. In this regard, the Statute is explicit:

> "If either party shall apply to the Court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material *and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency*, the court may order such additional evidence to be taken before the Board, its members, agent or agency, and to be made a part of the record." 29 U. S. C. 160(e). (Emphasis supplied.)[3]

While there is no question but that the Court has a measure of discretion with respect to remand, its discretion must be guided by the statutory mandate. *National Labor Relations Board* v. *Ochoa Fertilizer Corp., supra; Southport Petroleum Company* v. *National Labor Relations Board*, 315 U. S. 100 (1942); *National Labor Relations Board* v. *Fournier*, 182 F. 2d 621 (2nd Cir. 1950). Here there was no showing made by any party that there were

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[3] This provision is made applicable to this proceeding by virtue of 29 U. S. C. 160(f).

reasonable grounds for the failure to adduce the testimony sought by the remand, nor could there have been. Nor for that matter did the Court itself give any indication that such reasonable grounds existed.

The question of whether or not a conspiracy existed was actively contested at the hearing before the Trial Examiner and was fully briefed by the parties: first, to the Trial Examiner; then, to a Board panel; then, to the full Board on RCIA's motion for reconsideration of the Board's decision; and then, before the Court. In fact, on the basis of the Record made before him, the Trial Examiner, erroneously, found that a conspiracy had been made out (J.A. 177). It must be emphasized that the alleged connection of LaVictor and Ungar to the events involved here was well known to all parties throughout the proceedings, both individuals being named in the complaint (J.A. 147-148), in General Counsel's Exhibit No. 8 (J.A. 134-137), and in various other portions of the Record. Nevertheless, the Court of Appeals expressly remanded this case for the purpose of taking their testimony.

Furthermore, the Order of the Court of Appeals would seem to be fraught with constitutional difficulties.

The only issue on which this case is being sent back for the Board to take additional testimony is whether an agreement had been made by the company to hire Amalgamated organizers. Although this issue was never considered in any of the proceedings below as the sole basis on which a violation could be made out, it was actively litigated in connection with the question of whether the Amalgamated organizers had been hired pursuant to an agreement. The General Counsel and the charging party were never under any misconception as to the importance of sustaining the existence of such an agreement as a basic element of their case. Nor were the General Counsel or the charging party in the dark as to what witnesses they would need to prove this element of their case. Nor is there any

showing or allegation that any of these witnesses were not available to testify at the hearing before the Trial Examiner.

Despite all of this, the Court of Appeals has commanded the National Labor Relations Board to go back and litigate the conspiracy issue again. Indeed, from the scope of the Court of Appeals mandate, one may well infer that the Court permits the Board to retry the entire case. Thus, the Court of Appeals suggests that the Board call LaVictor as a witness on a remand. Yet, on the testimony of the Board's principal witness, Breihof, LaVictor knew nothing of any alleged agreement (J.A. 135). His testimony, therefore, would be relevant only as to the other issues of the case. In sum, the Board having failed to prove its case the first time around has been told, go back and try again. While double jeopardy does not apply foursquare to administrative adjudications the court's mandate here lies dangerously close to the Plimsoll Line of Due Process.

Additional Statements With Respect to Jurisdiction

The mandate of the Court of Appeals in this case, while not ultimately disposing of the litigation, raises issues fundamental to the future conduct of this case and to the ultimate disposition of it. Under a clear line of authority emanating from this Court in cases presenting procedural questions almost on all fours with the instant case, it is clear that the decision of the Court of Appeals is ripe for review on petition for certiorari. *Aetna Casualty And Surety Co.* v. *Flowers*, 330 U. S. 464 (1947); *Southwestern Sugar & Molasses Co.* v. *River Terminal Corp.*, 360 U. S. 411 (1959). See also *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *Land* v. *Dollar*, 330 U. S. 731 (1947) and *Gay* v. *Ruff*, 292 U. S. 25 (1934).

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

JACOB SHEINKMAN,
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New York 3, New York,
Attorney for Petitioners.

APPENDIX A

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,709

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO; CENTRAL STATES JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO; AND KENTUCKIANA JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Intervenors.

Petition to Review and Set Aside, and Cross-Petition for Enforcement of, an Order of the National Labor Relations Board.

Decided December 12, 1963

MR. TIM L. BORNSTEIN, with whom MR. S. G. LIPPMAN was on the brief, for petitioners.

Mr. Melvin J. Welles, Attorney, National Labor Relations Board, with whom Messrs. Dominick L. Manoli, Associate General Counsel, and Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Mr. Jacob Sheinkman for intervenors. Mr. Elliot Bredhoff also entered an appearance for intervenors.

Before:

Prettyman, *Senior Circuit Judge.*
Bastian and Wright, *Circuit Judges.*

Per Curiam: Petitioners seek to have this court review and set aside an order of the Board dismissing a complaint charging the Amalgamated Clothing Workers of America, AFL-CIO and the Miracle Mart of Muncie, Indiana, with execution of an illegal union security contract in violation of Sections 8(a)(1), (2), and (3),[1] and 8(b)(1)(A),[2] as unsupported by a preponderance of the evidence.

---

[1] Section 8(a)(1), (2), and (3) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 158(a) (1), (2), and (3), in pertinent part reads:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *."

[2] Section 8(b)(1)(A), 61 Stat. 141, 29 U. S. C. § 158(b)(1)(A), in pertinent part reads:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

Before the Board evidence was offered to show that one Ungar, Amalgamated's chief organizer, and one Breihof, general manager and labor relations director of Miracle Mart, entered into a conspiracy against petitioners to aid Amalgamated in the organization of the employer's store at Muncie. Pursuant to the conspiracy, three Amalgamated organizers are alleged to have been hired by one LaVictor, manager of the Muncie store, to assist in the organization. Without having the benefit of testimony of Ungar or LaVictor, the Board held that it was unnecessary to determine whether or not such a conspiracy did in fact exist because there was no proof that LaVictor hired the organizers in furtherance thereof.

The proof does show, however, that the acts alleged to have been agreed upon in the conspiracy did occur. The three organizers of Amalgamated did appear, they were hired by LaVictor, they did organize the Miracle Mart, and a contract was signed by Miracle Mart and Amalgamated.

We think that if the conspiracy between management and Amalgamated to organize the Muncie store existed, further proof of its effectiveness is not required to establish violations of Sections 8(a)(1), (2), and (3), and 8(b)(1)(A). Such a conspiracy would inevitably, in some degree at least, "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," and "interfere with the formation or administration of any

---

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; * * *."

Section 7, 61 Stat. 140, 29 U. S. C. § 157, reads:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

labor organization." 20 U. S. C. § 158(a)(1) and (2). See also 29 U. S. C. § 158(a)(3).

We remand the case to the Board for the taking of the testimony of Ungar and LaVictor, together with any other testimony which may assist the Board in determining whether or not a conspiracy to violate the sections of the Act in suit did in fact exist. If the Board finds that such a conspiracy did exist, it will provide appropriate remedies.

So ordered.

APPENDIX B

Order

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,709 September Term, 1963

Local 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, et al.,

Intervenors.

Before:

PRETTYMAN, *Senior Circuit Judge*,
BASTIAN and WRIGHT, *Circuit Judges*, in Chambers.

On consideration of the petition of intervenors for rehearing and of petitioners' answer thereto, it is

ORDERED by the court that intervenors' aforesaid petition is hereby denied.

Per Curiam

Dated: February 12, 1964

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1067

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioners, who were respondents in the Board proceeding, were permitted to intervene in the court of appeals (Pet. 2), and thus have standing to file the instant petition. *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338. The petition was

timely filed,[1] and the jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1).

STATEMENT

The Board dismissed, as unsupported by the evidence, a complaint alleging that Miracle Mart Corporation, which owned a chain of retail discount stores, illegally assisted petitioners, the Amalgamated Clothing Workers of America, AFL-CIO and certain of its joint boards, in organizing a new store in Muncie, Indiana (J.A. 190-195).[2] A key question in the case was whether three Amalgamated organizers (Norma Howard, Anna Fee and Mildred Denham), who were hired by Lester La Victor, the manager of the Muncie store, were placed in the store pursuant to a "conspiracy" between the Company and the Amalgamated to help the latter organize the employees in the store. The Trial Examiner found that the three employees had been hired pursuant to

---

[1] The judgment of the court of appeals was entered on December 12, 1963, and a Petition for Rehearing and Rehearing *en banc* was denied on February 12, 1964 (Pet. 21, 25). The petition for certiorari was filed on May 4, 1964.

[2] "J.A." references are to the Joint Appendix printed for the use of the court below and filed with the petition.

The complaint, which was based on charges filed by Local 1441, Retail Clerks Association, AFL-CIO and its parent International, alleged that the Company violated Sections 8(a)(1), (2) and (3), and the Amalgamated, Sections 8(b)(1)(A) and (b)(2), of the Act. The illegal assistance allegedly culminated in the execution of a contract with a union security provision, which was also allegedly unlawful. The relevant statutory provisions are set forth in the opinion of the court below (Pet. 22, notes 1 and 2).

such a conspiracy, basing his finding on the testimony of Charles Breihof, General Manager and Labor Relations Director of the Company. Breihof testified that, shortly before the new store was opened, Max Ungar, a representative of the Amalgamated, asked him to hire three women, who were strong Amalgamated supporters, and Breihof agreed (J.A. 175-176; 30-31). The Board set aside the Trial Examiner's finding. The Board held that, even assuming that Breihof had arranged with Ungar to hire three Amalgamated organizers, the record did not establish that the three employees in question were hired pursuant to that arrangement. The Board found, rather, that these employees were hired by Store Manager La Victor in the normal course of the Company's business. (J.A. 204-205.) The Board added that the arrangement between Breihof and Ungar standing alone was not unlawful, because at most it would indicate an intent to violate the Act which was not sufficient to establish the unfair labor practices charged (J.A. 205-206).

The court of appeals reversed. It held that, if there was a conspiracy between the Company and the Amalgamated to organize the Muncie store, further proof of its effectiveness was not required to establish a violation of the Act (Pet. 23). Accordingly, it remanded the case to the Board "for the taking of the testimony of Ungar and La Victor, together with any

---

The Board noted that La Victor, and not Breihof, did all the hiring at the Muncie store, and that there was no showing that La Victor knew about the alleged agreement between Breihof and Ungar (J.A. 205).

other testimony which may assist the Board in determining whether or not a conspiracy to violate the sections of the Act in suit did in fact exist" (Pet. 24).[4]

DISCUSSION

The basic question presented by the petition is whether an agreement between a union agent and an employer to hire union organizers violates the National Labor Relations Act, where there is no showing that the agreement was in fact carried out (Pet. 2). That question is not ripe for review and, in any event, is not of sufficient importance to warrant review by this Court.

Thus, on the remand ordered by the court below (which the Board has decided to accept), the Board may find that no conspiracy in fact existed with respect to the hiring of the three Amalgamated supporters,[5] or that the conspiracy not only existed but was indeed carried out. In either event, the question presented would be rendered academic. That question would be reached only if the Board were to find, on the remand, both that the conspiracy existed and it was never carried out; and, should the Board so find, petitioners would then be free, if the Board's findings were sustained by the court of appeals, to seek review by this Court.

---

[4] Neither Ungar nor La Victor testified at the prior Board hearing.

[5] In its prior decision, the Board merely assumed *arguendo* that such a conspiracy existed. The Board, however, did not have the benefit of the testimony of Ungar and La Victor, which the court below has directed it to take.

For these reasons, and because such an arrangement between an employer and a union is rarely not carried out,[6] the Board decided not to seek certiorari.[7] However, should the Court grant this petition, the Board would defend its decision.

Respectfully submitted,

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Attorney,

National Labor Relations Board.

MAY 1964.

---

[6] The cases cited by petitioners (Pet. 12-14) involve different facts.

[7] There is no substance to petitioners' contention (Pet. 16-19) that the court of appeals exceeded its authority in remanding the case to the Board for the taking of additional testimony. See *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373. In view of the fact that the Trial Examiner found that a conspiracy existed, and the Board, in reversing the Examiner, addressed itself to that issue at least *arguendo*, a remand on that issue was obviously not contrary to Section 10(e) of the Act, which precludes the reviewing court from considering an "objection that has not been urged before the Board, its member, agent, or agency" (Pet. 16).

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No. 1067

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, ET AL.,

Petitioners

and

NATIONAL LABOR RELATIONS BOARD,

v.

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND LOCAL 1441 IN OPPOSITION.

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND LOCAL 1441 IN OPPOSITION.

Question Presented

Whether it is an unfair labor practice under Sections 8(a)(1), (2) and (3) and 8(b)(1)(a) and (2) of the National Labor Relations Act, as amended, for an employer to conspire with a union to employ its organizers to "organize" employees where, in addition to the conspiracy itself, the following overt acts occur:

1) The undercover organizers are actually hired;

2) They organize the employees in the manner agreed upon and without interference from the employer;

3) The employer accords hasty recognition to the union upon request and then executes a complete collective bargaining contract on the day after the union is recognized.

Statement

On August 1, 1961, Charles Briehof, General Manager and Labor Relations Director of a chain of fourteen "Miracle Mart" discount department stores, was in Muncie, Indiana, to open a new store (J.A. 24, 27-29). There he met with Max Ungar, an official of the Amalgamated Clothing Workers of America (hereafter, "Amalgamated") (J.A. 30). According to Briehof's uncontradicted testimony, Ungar made the following request of him (J.A. 30-31):

> A. He requested that I hire organizers, three women in fact, that he would send down and they were experienced discount girls and assured me that they would do a quiet, efficient job of organizing the store.[1]

Briehof agreed to Ungar's scheme to assist Amalgamated by this secretive method (J.A. 31). The first of the three covert organizers, a Mrs. Howard, was to report to work the next day (J.A. 31), and the other two organizers, named Ice and Denham, were to report a week later (J.A. 31-33).

On August 2, Mrs. Howard was hired at the store. On August 7, Ice and Denham—officers of Amalgamated from

[1] Briehof's testimony was uncontradicted. For reasons known best to it, Amalgamated did not call Ungar to testify even though Ungar was the only person who could have contradicted Briehof's confession of the details of the conspiracy.

Louisville, Kentucky—appeared at the Muncie store (J.A. 84-85), and, in accordance with the Ungar-Briehof conspiracy, they reported directly to Briehof, who sent them to store manager LaVictor. LaVictor was then in the process of hiring new employees, and he hired them on the spot as sales clerks (J.A. 33, 57, 58).

During the ensuing week, while masquerading as bona fide "employees," Amalgamated's undercover organizers obtained a number of collective bargaining authorization cards from unsuspecting employees (J.A. 70-73). At the same time the employer maintained a "no solicitation" rule which resulted in denial to the Retail Clerks Union of any access to the employees in the store (J.A. 34-35).

On August 15, Amalgamated asked the employer for exclusive recognition as bargaining agent for the employees of its Muncie store (J.A. 36). The employer agreed to conduct a check of Amalgamated's authorization cards on that very day. Based on Amalgamated's majority status obtained through the efforts of Howard, Ice and Denham, the employer conferred on Amalgamated recognition as exclusive bargaining agent for all of its employees (J.A. 34-38).

On the next day, the original conspirators—Ungar and Briehof—met in Cleveland, Ohio, where they agreed upon and executed a collective bargaining agreement governing every phase of the working conditions of the employees in the Muncie store (J.A. 404). Their haste in conducting the card check and in executing this contract was for the admitted purpose of binding the employees to an Amalgamated contract before the Retail Clerks Union could organize them (J.A. 65, 67).

The Retail Clerks filed unfair labor practice charges under Sections 8(a)(1), (2), and (3), and 8(b)(1) and (2),

against Amalgamated and the employer, and a formal complaint was issued by the N.L.R.B.'s Regional Director.

After a full hearing an N.L.R.B. Trial Examiner sustained the allegations of the complaint that the Amalgamated and the employer had violated the Act. His crucial finding was this (J.A. 174-175):

> "... [The] facts established by the undisputed testimony of Charles Brielfof, former General Manager of the chain of stores, depict the unsavory spectacle of collusion between an employer . . . and [the Amalgamated] to deprive employees of their rights, guaranteed by Section 7 of the Act. . . .
>
> Such collusion consisted of an oral agreement between Brielfof and an Amalgamated representative, even before the Muncie store opened, whereby Amalgamated organizers would be hired as employees for the specific purpose of soliciting regular employees to join that labor organization. The agreement was fulfilled and . . . resulted in an exclusive-recognition contract between management and the Amalgamated.

By a vote of two to one,[2] a panel of the National Labor Relations Board reversed its Trial Examiner and dismissed the complaint on the sole ground that—assuming there was a conspiracy—the three covert organizers had been formally hired by store manager LaVictor and the record did not show whether LaVictor knew of the conspiracy entered into by Brielfof, his superior (J.A. 191). In other words, the Board held that no unfair labor practice had been committed because there was no proof that the technical act of hiring of three covert organizers by store manager LaVictor was itself "pursuant to" the conspiracy (J.A. 191).

Initially the Board ruled that LaVictor had hired the three organizers only because they were "experienced" dis-

[2] Member Leedom dissented on grounds not here relevant. He did not pass on the substantive questions reached by the other two members (J.A. 194-195).

count girls'" (J.A. 191). The Board quickly deleted this finding, however, upon reconsideration (J.A. 205), for their "experience" was not even the subject of an inquiry when they were hired (J.A. 198-199).

On the Retail Clerks' petition for review under § 10(f) of the Labor Act, the Court of Appeals for the District of Columbia Circuit reversed and remanded *per curiam*. Rejecting the Board's legal conclusion, the court below said (Pet. App. A, pp. 23-24):

> The proof does show . . . that the acts alleged to have been agreed upon in the conspiracy did occur. The three organizers of Amalgamated did appear; they were hired by LaVictor; they did organize the Miracle Mart; and a contract was signed by Miracle Mart and Amalgamated.
>
> We think that if the conspiracy between management and Amalgamated to organize the Muncie store existed, further proof of its effectiveness is not required to establish violations of Sections 8(a)(1), (2), and (3), and 8(b)(1)(A). Such a conspiracy would inevitably, in some degree at least, "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," and "interfere with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(1) and (2). See also 29 U.S.C. § 158(a)(3).

As the Board had merely "assumed" the existence of the conspiracy for purposes of its decision, the Court of Appeals remanded the case to the Board to take the additional testimony of Ungar and LaVictor[3] on the question of whether the conspiracy existed, with instructions to "provide appropriate remedies" if the Board finds that there was a conspiracy (Pet. App. A, p. 24).

Amalgamated's petition for rehearing or rehearing *en banc*, which raised most of the issues presented in its petition here, was denied *per curiam* (Pet. App. B, p. 25).

[3] The remand with instructions to take the testimony of Ungar and LaVictor was not suggested by any party.

Argument

1. Petitioner does not suggest that this case is of any general importance to the public or to the administration of the Labor Act. Every other consideration aside, therefore, petitioner's failure to show that this case is worthy of the Court's attention is an incurable defect. See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74. Moreover, we have been informally advised that the N.L.R.B. will similarly oppose granting the petition, even though it was the N.L.R.B.'s order which was reversed below.

There is scant need to demonstrate that the facts of this case are *sui generis*, for in the history of the Taft-Hartley Act we have not found one other case which involves substantially parallel facts.

2. The judgment of the court below lacks finality because it merely remanded the cause to the Board to take additional testimony on the question of whether there was a conspiracy. Only if the Board finds that there was a conspiracy is the Board required to apply appropriate remedies. If the Board finds that there was no conspiracy, it would dismiss the complaint on grounds wholly unrelated to the substantive holding of the Court of Appeals, and the question decided by the court below would become moot.

As there is no showing by petitioner that interim review by this Court is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause," *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384, the Court should not exercise its discretion to review this interlocutory order under 28 U.S.C. § 1254(1).

3. The Court of Appeals *sua sponte* remanded this case to the Board with instructions to take the additional testi-

mony of Ungar and LaVictor on the question of whether there was a conspiracy, as neither of them had been called to testify before the Trial Examiner. As Briehof testified to the conspiracy, and his testimony is uncontradicted, there was no need for the Court to remand the case in this fashion. However, it had both statutory authority to do so under Section 10(e) of the Labor Act ("to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board") and inherent authority to do so. See, e.g., *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 16-17. Petitioner's tendentious argument that the court below lacked the statutory power to remand the cause for this purpose is frivolous (Pet., pp. 17-18), and petitioner's suggestion that the remand order "lies dangerously close to the Plimsoll Line of Due Process" as a matter of "double jeopardy" (Pet., p. 19) misconceives elementary principles of due process and double jeopardy.

4. Petitioner's efforts to establish some conflict between the decision of the court below and earlier decisions of this Court, of other Courts of Appeals, and of the N.L.R.B. (Pet., pp. 12-13) are spurious. Petitioner's contentions in this respect rest on a flagrant misreading of the decision below, for petitioner asserts that it "boils down to the creation of the unfair labor practice of conspiracy, *per se*" (Pet., p. 12).

The Court of Appeals did not hold that the employer's conspiracy with Amalgamated was *per se* an unfair labor practice. On the contrary, the decision means precisely what it says: Where "acts alleged to have been agreed upon in the conspiracy did occur . . . further proof of . . . the conspiracy's effectiveness is not required to establish violations of Sections 8(a)(1), (2), and (3), and 8(d)(1)(A)"

(Pet. App. A, p. 23). How can this decision be said to create a *per se* "conspiracy" doctrine? It was the conspiracy *combined* with the "acts alleged to have been agreed upon in the conspiracy" which, in the opinion of the Court of Appeals, constituted an unfair labor practice.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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October Term, 1963

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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IN THE

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October Term, 1963

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LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND NATIONAL LABOR RELATIONS BOARD,

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PETITIONERS' REPLY MEMORANDUM

The Memorandum of the National Labor Relations Board filed in this matter, in stating the Board's reasons for opposing the petition herein, only serves to buttress petitioners' argument that the issues presented by the said petition are ripe for review at this time. The petition sets forth three basic objections to the decision of the Circuit Court of Appeals, all of which are stated as the "Questions Presented" in said Petition, and they are:

> 1. Whether an agreement between a union agent and a company agent to hire union organizers as regular employees violates Section 8(b)(1)(A) of the National Labor Relations Act, where no organizers were hired pursuant to such agreement, and where there has been no finding that the union was otherwise aided or assisted in violation of Section 8(a)(2) of the National Labor Relations Act.

2. Whether the Court of Appeals on review of a Decision and Order of the National Labor Relations Board may rule on an alleged violation of the National Labor Relations Act not alleged in the complaint issued by the Board and not raised by any of the parties in any prior proceeding on or before the Court itself.

3. Whether the Court of Appeals on review of a Decision and Order of the National Labor Relations Board may remand a case to the Board for the taking of evidence on a point involving a novel theory of law not raised by any of the parties in any prior proceeding or before the Court itself, where such a remand was not requested by any of the parties and where there is no showing that the evidence sought was not available at the hearing before the Trial Examiner.

The Board, however, in its memorandum, makes only passing reference to Question 2 (see fn. 7, on page 5 of the Board's Memorandum) and then blithely lumps Questions 1 and 3 together without differentiating between the substantive and procedural aspects thereof. Question 1 is, of course, substantive in nature and raises the issue whether the mere making of an alleged agreement between a union and an employer to have union organizers hired as employees violates Section 8(b)(1)(A) of the National Labor Relations Act, even though no such organizers are hired pursuant thereto and no other violations of the Act are found. This issue is covered in the petition at page 10, *et seq.*, and will not be repeated here. However, because of the Board's statements on pages 4 and 5 of its memorandum, with reference to this issue, Question 3, which raises the procedural aspects of the problem, becomes extremely important. Even, assuming *arguendo*, that the Board is correct in its position that Question 1 is not ripe for review, Question 3 most certainly is, if the Board on the remand of the court below is going to relitigate not only the issue of the existence of a conspiracy but also

whether it was in fact effectuated. Both of these issues were fully understood by all of the parties to be material aspects of the case when it was being tried and there is no need for, nor indeed has any reason been advanced, why additional testimony should be adduced on either or both of them.

On pages 18 and 19 of the petition, petitioners have pointed out that the issue on which the court below directed that additional testimony be taken was fully litigated, and on the basis of the testimony adduced the Trial Examiner found that a conspiracy had been made out (J.A. 177). The Board found that if the Trial Examiner was correct, and an arrangement had been made to hire the three employees in question, the record did not establish that the three employees in question were hired pursuant to that arrangement (J.A. 204-205). Petitioners further pointed out in their petition that by directing the Board to take further testimony with respect to persons who could have been called as witnesses by the parties but in fact were not, and in particular a witness who knew nothing of any alleged agreement, the court below indeed was directing the Board to relitigate this entire case (Pet. p. 19). If there be any doubt in this regard, one need look no further than to the Board's position to the effect that if the Board were to find on remand

> (1) "* * * that no conspiracy in fact existed * * *"; or
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> (2) "* * * that the conspiracy not only existed, but was indeed carried out"; or
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> (3) "* * * *both* that the conspiracy existed and it was never carried out" (emphasis supplied),

the issue raised by the petitioners would under (1) or (2) be rendered academic, and under (3) petitioners could then seek review. (Board's Memorandum, p. 4). But, what the Board neglects to mention is that a holding under (2) or (3) requires *de novo* findings as to both the con-

spiracy question as well as its effectuation, a position which the Board cannot reconcile with its decision that the record shows that the three employees in question were hired in the normal course of the Company's business, and not pursuant to any conspiracy, a position it is apparently ready to defend should the Court grant this petition (Board's Memorandum, p. 5).

If for no other reason but because the remand of the court below commands the relitigation of the issue of the effectuation of the conspiracy, as well as its making, *certiorari* must be granted now. If the Circuit Court of Appeals had in fact directed the Board to make a determination solely on the issue of conspiracy on the basis of the existing record which, as the Board points out, the Trial Examiner did in fact do, the Board's argument that petitioners could file for review if the Board should find that the conspiracy did exist, would carry more weight. This the court below did not do. Instead it directed the taking of testimony as to the making of the conspiracy and its effectuation[1] upon which evidence had already been received, the Board having already made a finding in petitioners' favor on the latter issue.[1] It is precisely because of the fact that the impact of the decision of the court below compels a relitigation of the issue of the making of the conspiracy as well as its effectuation that petitioners were forced to file their petition at this time.

Nor does the Board meet petitioners' objections to a reopening of the record for the taking of additional testimony by merely stating that "Neither Ungar nor La Victor testified at the prior hearing." (Board's Memorandum, fn. 4, p. 4.) The failure of the Board to have called these

[1] The testimony of La Victor which the court below directed be taken can only bear on the issue of the effectuation of the alleged conspiracy, not the making of same, because the Board's principal and only witness who testified on this issue testified that La Victor knew nothing of any alleged conspiracy (J.A. 135).

witnesses is not explained by the Board, nor for that matter did the Circuit Court of Appeals indicate that these witnesses were not called because of their unavailability, or the unawareness of the Board that their testimony had a bearing upon the case.[2] No ground, let alone a reasonable ground, is given by the Board at this time which would justify a reopening of the record to take additional testimony, except to give the Board another opportunity to retry its case. This can be the only basis which would support the Board's statement in its memorandum to the effect that "because such an arrangement between an employer and a union is rarely not carried out, the Board decided not to seek certiorari" (p. 5). Nor can the Board justify this statement in the face of its prior holding that the "record does not show that [Amalgamated organizers] were hired pursuant to any 'arrangement'" (J.A. 205), a holding it will defend should the Court grant the petition herein.

In short, if as the Board and petitioners argue, the remand requires the Board to make findings *de novo* on the issue of not only whether the conspiracy existed "but was indeed carried out," which apparently is how the Board and petitioners construe the directive of the court below, then most certainly the issues which petitioners seek to have reviewed at this time are overripe. Petitioners object to the taking of additional testimony on an issue which has been fully litigated and on which the Board can make a finding upon the evidence already received,[3] as

[2] Both Ungar and La Victor were named in the complaint (J.A. 147-148), in General Counsel's Exhibit No. 8 (J.A. 134-137), and in other portions of the record.

[3] *See Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568; *International Shoe Company* v. *Federal Trade Commission*, 280 U. S. 291. Moreover, as the Retail Clerks International Association and Local 1441 stated on page 7 of their brief in opposition to the petition, "As Breiholff testified to the conspiracy, and his testimony is uncontradicted, there was no need for the Court to remand the case in this fashion."

well as on the issue as to which the Board already found in petitioners' favor. It is precisely because of the import of the remand and of the consequences which flow therefrom which form the basis for the Court to grant review at this time.

If the Board is prepared to defend its decision should the Court grant the petition,[4] then it should be prepared to oppose the remand in its present form and scope. The issues raised by the petitioners herein are of prime importance when the adoption of a conspiracy *per se* approach to the National Labor Relations Act is for the first time being promulgated.

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Respectfully submitted,

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[4] If this be the case, then the Board might well recheck the cases cited by petitioners (Pet. 12-14) in that some of these cases were cited by the Board in its decision, and in its brief to the Circuit Court of Appeals defending that decision.